Supreme Court, U.S.
FILED
APR 14 2005
OFFICE OF THE CLERK

No. 04-1397

IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, AND
FRED LAWRENCE,
Petitioners,

v.

EMMANUEL SENYO AGYEMAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Ste. 800
Phoenix, Arizona 85012
(602) 263-1700

* Counsel of Record

Counsel for Petitioner

April 13, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the correct standard for assessing an indigent plaintiff's request for appointed counsel under 28 U.S.C. § 1915(e)(1) is the "broad discretion" test used in the Second, Third, and Seventh Circuits, or the stricter "exceptional circumstances" test used in the Fourth, Sixth and Ninth Circuits?

2. Whether a trial court abuses its discretion by denying appointed counsel for a *pro se* plaintiff who is "literate . . . educated [and] able to read statutes and legal literature," but who "lacks legal training," as the Ninth Circuit held in this case?

PARTIES TO THE PROCEEDING

Petitioners are employees of the Corrections Corporation of America (CCA), a private prison corporation that contracts with various governmental entities, including the United States of America, to incarcerate detainees and convicted inmates.

Respondent is a former INS alien detainee who was incarcerated at CCA's Central Arizona Detention Center and Eloy Detention Center, pursuant to CCA's contract with the United States of America to house INS detainees and United States Marshal's Service inmates. Respondent alleged that Petitioners subjected him to excessive force and retaliated against him while he was housed in the CCA facilities.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
FEDERAL STATUTORY PROVISION INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	13
I. FEDERAL CIRCUITS ARE SPLIT ON THE DEGREE OF DISCRETION THAT DISTRICT COURTS MAY USE IN DETERMINING REQUESTS FOR APPOINTED COUNSEL.	15
II. THE NINTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH ANY OF THE CIRCUITS' STANDARDS FOR APPOINTING COUNSEL	18
A. Educated, literate plaintiffs who can articulate their claims are not entitled to appointed counsel under any circuit's formulation of the federal standard.	19
B. Excessive force cases like this one are simply not complex.	22
CONCLUSION	27

TABLE OF AUTHORITIES

CASES Page

Agyeman v. Coachman, 74 Fed. Appx. 691 (9th Cir. 2003) 13, 26
Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir.1980) ... 2, 16
Beaudett v. City of Hampton, 775 F.2d 1274 (4th Cir.1985) 22
Bell v. Wolfish, 441 U.S. 520 (1979) 12, 25
Brown v. Kordis, 46 Fed. Appx. 315, 2002 WL 31055978 (6th Cir. 2002) 22
Butler v. Cloud, 78 Fed. Appx. 374, 2003 WL 22391198 (5th Cir. 2003) 22
Castillo v Cook County Mail Room Dep't, 990 F.2d 304 (7th Cir. 1993) 20
Childs v Duckworth, 705 F.2d 915 (7th Cir. 1983) 21
Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975) 2, 15
Cookish v Cunningham, 787 F.2d 1 (1st Cir. 1986) 20
Cooper v. A. Sargenti Co., 877 F.2d 170 (2d Cir.1989) 6, 15
Cox v. Mitchell, 2004 WL 2545034 (N.D.Tex. 2004) 16
Davidson v. Goord, 259 F. Supp. 2d 238 (W.D.N.Y. 2003) 21
DesRosiers v. Moran, 949 F.2d 15 (1st Cir. 1991) 16
Farmer v. Haas, 990 F.2d 319 (7th Cir.), *cert. denied*, 114 S.Ct. 438 (1993) 18
Hall v. City of Philadelphia, 828 F. Supp. 365 (E.D.Pa. 1993) 23
Hendricks v. Coughlin, 114 F.3d 390 (2d Cir.1997) 16
Hetzel v Swartz, 917 F Supp 344 (M.D. Pa. 1996) 20

TABLE OF AUTHORITIES—Continued

	Page
Hill v. Davidson, 844 F. Supp. 237 (E.D.Pa. 1994)	21
Hodge v. Police Officers, 802 F.2d 58 (2d Cir.1986)	2, 15
Johnson v. Weaver, 81 Fed. Appx. 841, 2003 WL 22867614 (5th Cir. 2003)	22
Keller v. Trefz, 66 Fed.Appx. 44, 2003 WL 1870718 (7th Cir. 2003)	22
King v. Patterson, 999 F.2d 351 (8th Cir. 1993)	22
Lavado v. Keohane, 992 F.2d 601 (6th Cir. 1993)	2, 15
Liggins v. Rivas, 990 F.2d 1258 (9th Cir. 1993)	23
Lockert v Faulkner, 574 F. Supp. 606 (N.D. Ind. 1983)	21
Long v. Shillinger, 927 F.2d 525 (10th Cir. 1991)	17
Maclin v Freake, 650 F.2d 885 (7th Cir. 1981)	2, 15, 18
Martin v. Sias, 88 F.3d 774 (9th Cir.1996)	11, 24
McCarthy v Weinberg, 753 F.2d 836 (10th Cir. 1985)	20
Mosby v Mabry, 697 F.2d 213 (8th Cir. 1982)	21
Peoples v. Kimmey, 67 Fed. Appx. 506, 2003 WL 21143107 (10th Cir. 2003)	22
Poindexter v. F.B.I., 737 F.2d 1173 (D.C. Cir. 1984)	16
Richardson v Henry, 902 F.2d 414 (5th Cir. 1990)	20
Rogers v. Scheffer, 2005 WL 568034 (W.D.Wis. 2005)	22
Royal v. Doe, 19 Fed. Appx. 455, 2001 WL 1104467 (8th Cir. 2001)	22
Shaffer v. Brinegar, 23 Fed. Appx. 580 (7th Cir. 2001)	23

TABLE OF AUTHORITIES—Continued

Page

Smith v. Myers, 2005 WL 525159 (4th Cir. 2005) 22
Stewart v. Simpson, 15 Fed. Appx. 460, 2001 WL 823873 (9th Cir. 2001) 22
Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993) 21
Tabron v. Grace, 6 F.3d 147 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994) 3, 16, 17
Turner v. Safley, 482 U.S. 78 (1987) 12, 25
Velasquez v. O'Keefe, 899 F. Supp. 972 (N.D.N.Y.1995) 23
Whisenant v Yuam, 739 F.2d 160 (4th Cir. 1984), abrogated on other grounds, *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296 (1989) 20
Wilborn v. Escalderon, 789 F.2d 1328 (9th Cir. 1986) 4

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1915(e)(1).....2, 5, 13

IN THE

Supreme Court of the United States

No. ___

EDWARD GERBER, JESSE VALADEZ, AND
FRED LAWRENCE,
Petitioners,

v.

EMMANUEL SENYO AGYEMAN,
Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION AND JUDGMENT BELOW

The order of the court of appeals denying the petition for rehearing en banc is unreported and is reprinted in the Appendix to this Petition ("App") at 11a. The underlying opinion of the court of appeals is reported at 390 F.3d 1101 (9th Cir. 2004) (App. 1a-6a). The decision of the district court denying respondent's motion for appointment of counsel is unreported. (App. 7a-10a).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on December 6, 2004, and the order of the court of appeals denying the petition for rehearing en banc was entered on January 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISION INVOLVED

28 U.S.C. § 1915(e)(1) provides: "The court may request an attorney to represent any person unable to afford counsel."

INTRODUCTION

The circuit courts are split on the degree of discretion that district courts may use when assessing indigent plaintiffs' requests for appointed counsel under 28 U.S.C. § 1915(e)(1). While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion to decide whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." *Compare Maclin v. Freake*, 650 F.2d 885 (7th Cir.1981) (providing a list of factors for consideration and allowing district courts broad discretion in deciding whether to grant a request for appointment of counsel) *and Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir.1986) (recognizing some circuits have adopted a more "stringent" approach, but opting to follow the lead of the Seventh Circuit) *with Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993) (holding that district courts in the Sixth Circuit may appoint counsel to represent indigent civil litigants only when "exceptional circumstances" are present) *and Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980) ("[T]his court has limited the exercise of [discretionary power under § 1915] to exceptional circumstances"). The Third Circuit, in fact, has expressly

rejected the "exceptional circumstances" test that the Fourth, Sixth and Ninth Circuits use. *Tabron v. Grace*, 6 F.3d 147, 155, 158 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994) (holding that use of improper "extraordinary circumstances" standard and failure to provide other reasons for denying appointment of counsel warranted vacation of summary judgment and remand). This Court has not yet spoken on the issue.

Not only is the standard not uniform among the circuits, but those circuits taking the Seventh Circuit's "broad discretion" approach are not uniform on the factors that district courts should consider in assessing such requests; and those circuits requiring "exceptional circumstances" have not developed a uniform definition of what constitutes "exceptional circumstances." Because many courts treat the determination of whether to appoint counsel as a factual inquiry that will vary from case to case, and because this Court has not spoken on the issue, the result is that, for all practical purposes, there is no standard. The "standard" is so amorphous that courts essentially are free to do whatever their various sensibilities dictate.

In this case, for example, the Ninth Circuit held that the trial court abused its discretion in denying Respondent's request for counsel, even though the appellate court recognized that "Ageyman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training." (App. 6a). If a lack of legal training is the test of "exceptional circumstances"—which is the standard in the Ninth Circuit—then frankly all cases involving *pro per* plaintiffs will present exceptional circumstances. The result is to obliterate any discretion the trial court might have had to deny counsel to those educated, literate plaintiffs who are well able to articulate straightforward claims. Had this case arisen in a circuit that required

the court to examine discrete factors, the trial court's discretionary denial of counsel would likely have been upheld.

The court's holding in this case does not even meet the Ninth Circuit's own formulation of "exceptional circumstances"—namely, that plaintiff has demonstrated (1) the likelihood of success on the merits and (2) an inability to articulate his claims in light of the complexity of the legal issues involved. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Not only did the court find Respondent educated and articulate, but the Ninth Circuit never once mentioned the "likelihood of success on the merits" of Respondent's excessive force claim—the only claim the court addressed in its opinion. The court said only, "The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of success on a claim that had not been properly framed." (App. 6a). In truth, there was nothing wrong with the way Respondent framed his excessive force claim. He alleged that Petitioners used excessive force when they executed a take-down occasioned by Respondent lunging at and biting officers trying to escort him to a cell. Indeed, he succeeded in getting that claim to trial. The only reason the court thought the excessive force claim was not "properly framed" was that Judge John Noonan (writing for himself and Judges Betty Fletcher and Sidney Thomas) decided *sua sponte* that Respondent should have filed a completely different lawsuit. Instead of an excessive force claim, the court thought Respondent should have challenged the prison's transport policy. In the court's words, "Is there any warrant for shackling the feet and binding the chest of an innocent detainee?" (App. 6a)—apparently a type of substantive due process claim.

So obsessed was the Ninth Circuit with its own "court-created claim" that during the appellate oral argument, the court gave Petitioners five days to produce "the prison policy that allowed defendants to 'place heavy restraints on detain-

ees who are having heart attacks'"—even though the prison's transport policy had nothing to do with plaintiff's take-down or his excessive force claim, was never challenged in this lawsuit, was not admitted into evidence or part of the record below, and even though the record was devoid of evidence that plaintiff was "having a heart attack," or was wearing "heavy" restraints, or was "bound at the chest"; and the record contained plenty of evidence that Respondent was anything but an "innocent detainee." To put it bluntly, the Ninth Circuit made up a new fact pattern and a new lawsuit and then chastised the district court for not appointing counsel under the actual facts and claims presented in this case. It was wholly inappropriate for the Ninth Circuit to abandon its role as objective arbiter of the facts and claims presented, and to become an advocate for Respondent, choosing different claims for him to bring, on non-existent facts, and ordering counsel appointed for him to assert this new claim in an attempt to find some "coherent theory for subjecting CCA to liability." (App. 6a).

Because federal law does not provide any uniform, articulable standard for when a trial court must appoint counsel for an indigent plaintiff, or for what constitutes "exceptional circumstances" if that is the test, the Ninth Circuit in this case was able to hold that the trial court abused its discretion in denying Respondent counsel even though Respondent is literate, articulate and able to read and understand statutes and legal literature and well articulated the claims he wanted to raise. Trial courts must now act as advocates for indigent plaintiffs, appointing counsel where the plaintiff lacks the legal training to raise completely different claims that the court suggests could be raised. This cannot be the standard for appointing counsel under 28 U.S.C. § 1915(e)(1). First, courts cannot be directed to advocate for certain litigants; and second, under such a standard, trial courts no longer have any discretion in the matter. Because every *pro per* litigant by definition lacks legal training, counsel would have to be

appointed in every case. This new standard will likely increase the amount and cost of litigation in the lower courts and drain those courts of the resources that should be preserved for the truly deserving indigent *pro per* litigants who cannot articulate their complex claims. "Every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause." *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir.1989). Certiorari should be granted to set forth a uniform standard and to correct this dangerous precedent.

STATEMENT OF THE CASE

The INS arrested Respondent on February 24, 1997 on a bench warrant for passing a bad check, or for DUI, and he was incarcerated as a pretrial detainee at CCA's Eloy Detention Center. Respondent was transferred during the course of his detainment, but ultimately ended up back at Eloy. Respondent's initial complaint alleged that Petitioners were deliberately indifferent to his medical needs, subjected him to excessive force, and retaliated against him for filing numerous lawsuits against CCA and its employees. Counts I, III and VI were dismissed, and Count V was withdrawn. Respondent took two counts of his Second Amended Complaint to trial—Count II (retaliation) and Count IV (excessive force).

In the single pre-trial request for counsel that Respondent Agyeman made to the Arizona District Court—two and a half years before trial—Respondent complained *only* that the Maricopa County Jail where he was located at the time lacked a law library, and that "counsel is necessary to depose the opposing party." Shortly thereafter, Respondent was transferred to an INS facility in Florence, Arizona, thus mooting

his claim of no law library facilities. During the next three years, Respondent never again asked for counsel.[1]

On this record, the Magistrate Judge denied the request to appoint counsel. In a three-page order, the trial court ruled that (1) there is no constitutional right to appointment of counsel in a civil case; (2) this case was beyond the pleading stage for which the constitutional right of access to the courts would apply; (3) Mr. Agyeman had not demonstrated a likelihood of success on the merits; (4) he had not shown that any difficulty he was experiencing derived from the complexity of the case; (5) he had already been transferred to an INS facility in Florence, Arizona, thus mooting his complaint of no law library at the Maricopa County Jail; and (6) his desire to depose a party did not entitle him to appointment of counsel. (App. 7a-10a).

Respondent thereafter fully litigated his case, well articulating his claims in amended complaints, and filing many, many pleadings containing appropriate legal citations. He survived summary judgment on two claims, citing legal authority and submitting a separate statement of facts and affidavit; participated in filing the joint pretrial statement; filed a twelve-page trial brief setting forth his positions and citing legal authorities; submitted a motion in limine; submitted proposed jury instructions; at trial questioned the witnesses and testified himself; then filed a motion for new trial, and a Rule 60(b)(3) motion.

The case was tried on two straightforward claims. The first claim dealt with the reason Respondent was kept in segregation. Respondent claimed it was in retaliation for his having filed complaints and lawsuits regarding his incarceration.[2]

---

[1] On the day trial began, Respondent did ask the trial judge "if it's too late to make a motion for appointment of counsel?"

[2] Mr. Agyeman has litigated, on his own, eighteen separate federal and state civil lawsuits. *See Agyeman v. CCA*, Ninth Circuit No. 04-16672;

On the other hand, Petitioners adduced evidence that it was the result of Respondent's repeated disciplinary rule infractions—for example, the time Respondent told an officer that he was a "fucking buffoon" and that his mother was a "fucking slut," and then had to be held back from advancing on the officer; or the time he threw a dinner tray at an officer, hitting him and splashing food all over his shirt, stating, "All you officers are fucking assholes"; or the time when an officer told him repeatedly to stop climbing the fence and yelling at another detainee, and Respondent told the officer, "No, Fuck you"; or when Respondent called a transporting officer "bloody asshole, fucking baboon and an idiot," then told him, "I will fix your fucking white ass. You will see that I will fucking get you"; or the time Respondent urinated through his cell door, then refused to cooperate with the investigation of such. These and a myriad of other incidents demonstrated to the jury that Respondent was not, as the Ninth Circuit termed him, an "innocent detainee." (App. 6a). In any event, all the jury had to decide here was whether it believed Respondent's or Petitioners' reasons for housing Respondent in segregation.

Agyeman v. Ashcroft, Ninth Circuit No. 03-72855; *Agyeman v. Kern County Sheriff*, Ninth Circuit No. 02-17076; *Agyeman v. Coachman*, Ninth Circuit No. 01-16910; *Agyeman v. INS*, Ninth Circuit No. 99-70396; *Agyeman v. Baranick*, Ariz. District Court No. 04-CV00936; *Agyeman v. CCA*, Ariz. District Court No. 04-CV00863; *Agyeman v. CCA*, Ariz. District Court No. 03-CV01229; *Agyeman v. INS Officials*, Ariz. District Court No. 02-CV01618; *Agyeman v. CCA*, Ariz. District Court No. 02-CV01618; *Agyeman v. CCA*, Ariz. District Court No. 99-CV01366; *Agyeman v. Gluch*, Ariz. District Court No. 99-CV01450; *Agyeman v. Zurich Insurance Co.*, Ariz. District Court No. 99-CV01501; *Agyeman v. CCA*, Arizona District Court No. 98-CV00188; *Agyeman v. CCA*, Ariz. District Court No. 97-CV02159; *Agyeman v. Rodman*, Pinal County Superior Court No. 1100-CV-200400635; *Agyeman v. CCA*, Pinal County Superior Court No. 1100-CV-200300864; and *Agyeman v. City of North Las Vegas*, Nevada District Court No. CVS99-1487.

The issue in the second claim was whether the Petitioner officers used excessive force when executing a take-down of Respondent. Respondent had refused to be transported to a community medical center in restraints, stating that restraints were "silly and childish." As two officers were escorting plaintiff to a medical isolation cell instead, Respondent escaped the officers, lowered his head, and lunged at another officer in an attempt to bite him on the neck. The officer placed plaintiff in a headlock and, in Respondent's own words, began "placing [him] on the floor," when Respondent bit both him and Captain Lopez, who had come to assist, on the fingers. Respondent did not claim any soft tissue injuries, or other medically complex physiological or psychological injury, and in fact refused any medical assessment or treatment. Only fact witnesses testified at trial. There were no expert witnesses, and no complicated medical records. There was no issue of whether restraints were appropriate or not. The **only** issue for the jury was whether the force the officers used for the take-down was reasonable under the circumstances. After a three-and-a-half day trial, the jury took an hour to find in favor of defendants on all claims.

In a published opinion, the Ninth Circuit reversed, holding that the trial court had abused its discretion in denying Respondent's request for counsel. Regarding Respondent's ability to articulate his claims, the court said only, "Ageyman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training." (App. 6a). Indeed, at trial, Respondent claimed to have obtained a masters' degree from the London School of Economics.

As to the likelihood of success requirement, the court's only mention was that, "The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of success on a claim [referring to the excessive force claim] that had not been properly framed." (App. 6a).

Again, the only reason the court thought the excessive force claim was not "properly framed" was that the court decided *sua sponte* that Respondent could have filed a completely different lawsuit. Instead of an excessive force claim, the court thought Respondent could have brought a claim asking "Is there any warrant for shackling the feet and binding the chest of an innocent detainee?" (App. 6a). So obsessed was the court with this new "court-created claim" that during the appellate oral argument, the court gave Petitioners five days to produce "the prison policy that allowed defendants to 'place heavy restraints on detainees who are having heart attacks'"—even though the prison's transport policy had nothing to do with plaintiff's excessive force claim, was never challenged in this lawsuit, was not admitted into evidence or part of the record below, and even though the record was devoid of evidence that plaintiff was "having a heart attack," or was wearing "heavy" restraints, or was "bound at the chest"; and the record contained plenty of evidence that Respondent was anything but an "innocent detainee." To put it bluntly, the Ninth Circuit made up a new fact pattern and a new lawsuit and then chastised the district court for not appointing counsel under the actual facts and claims presented in this case.[3]

---

[3] Defense counsel strenuously objected to Judge Thomas's order to produce its transport policies after the appellate oral argument, but nevertheless did so. While thus not part of the district court's record on appeal, those policies confirm that all inmates—detainees and convicts alike—must be transported outside the facility in "handcuffs, waist chain and leg restraints" before moving them outside to a vehicle—and for good reason, as Respondent's assault and bites on the officers in this case well demonstrate. Any request for a reduced level of restraint must be made by a physician or Health Services Supervisor in writing, recording the detainee's physical limitation and the consequences a particular type of restraint might have on the detainee if used. This record contained no evidence whatsoever of a doctor's written request for a reduced level of restraint for Respondent.

The Ninth Circuit also manufactured what it called a "triple complexity" to justify its holding that appointed counsel was required in this case. In truth, not one of the three asserted "complexities" existed. Focusing only on the excessive force claim, the court's first offered complexity was that Respondent could have added the United States as a defendant under the Federal Tort Claims Act, and also sued CCA either directly in tort, or as an added defendant to the FTCA claim. (App. 4a-5a). But the United States would not have been a proper defendant on plaintiff's excessive force claim. The federal government had nothing to do with the amount of force CCA's employees used for plaintiff's take-down. And adding CCA as a defendant to this claim would have made no substantive difference whatsoever. The same evidence was proffered and the same jury instructions were given as would have been had CCA been a defendant. The jury simply found no excessive force. Plainly, the addition of the United States or CCA as defendants to this claim was not a "complexity" that required appointment of counsel.

The Ninth Circuit's second "complexity" was that the case against the individual employees should have been brought under *Bivens*, and not under § 1983 as Respondent had cited. (App. 5a). But it is completely irrelevant that *Bivens* was the correct jurisdictional basis rather than 42 U.S.C. § 1983. *Bivens* actions and § 1983 actions are analogous; the only difference is that *Bivens* applies to constitutional violations by federal, rather than state officials. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996) (Section 1983 and Bivens actions identical except for requirement of state actor under § 1983 and federal actor under *Bivens*). For this very reason, no one raised this technicality below; no one moved to dismiss on this basis; the case went to trial despite plaintiff's reliance on § 1983 instead of *Bivens*; and the jury instructions that were given were no different than those that would have been given had plaintiff stated the correct jurisdictional basis. Even on appeal, Petitioners simply noted in passing that the

correct legal basis for the suit was *Bivens* instead of § 1983. This was certainly not a "complexity" of the case that required appointment of counsel.

The court's third cited complexity was that "an issue existed as to whether the prison's policies requiring restraints when transporting inmates applied to a non-criminal detainee like plaintiff (App. 5a), but plaintiff, who lacks legal training, did not "properly frame" this issue or ask for those policies (App. 5a, 6a). Of course, the propriety of requiring restraints to transport Respondent was not a claim in this case in any way, shape or form. Furthermore, if the court was suggesting that **this** case was complex because it thought Respondent could sue the federal government and CCA on a **different** claim—i.e., for requiring transport restraints for detainees—the court respectfully was wrong.[4] No prison in the nation allows detainees to be transported outside the facility without restraints; and no prison in the nation allows a detainee to direct when a reduced level of restraint will be used. A written doctor's order is required before any inmate can be transported with a reduced level of restraint. Not surprisingly, the Ninth Circuit did not cite any authority showing that Respondent would likely have succeeded on such a claim. In truth, such a challenge to the prison's policy to restrain detainees for transport would have flown in the face of *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (conditions of pretrial detention reasonably related to a legitimate governmental objective are constitutional); and *Turner v. Safley*, 482 U.S. 78, 89 (1987) (jail officials, more experienced in the behavior of inmates, must have the latitude "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Thus, the

---

[4] The panel apparently thought this might have been a "coherent theory for subjecting CCA to liability" (App. 6a)—a notion that might have suited the Ninth Circuit's sensibilities, but which is completely improper for an objective arbiter of the facts and claims brought before it.

court's third cited "complexity" was not a viable justification for requiring appointed counsel in the case that Respondent did file.

The panel cited one last "fact" that it said "enhanc[ed] the exceptional character of the case," and that was "the anomaly of incarcerating a person on non-criminal charges and confining him for seven years." (App. 6a). But the length of plaintiff's detainment was never an issue, a claim, or an argument in this lawsuit. In fact, the Ninth Circuit had already ruled in a prior opinion that the length of Respondent's incarceration was constitutional. *Agyeman v. Coachman*, 74 Fed. Appx. 691, 694 (9th Cir. 2003). In that same decision, the court found that it was Respondent himself who had substantially caused the delays with which the court seemed to be so concerned in this case. The length of Respondent's detainment was not an exceptional circumstance that required appointed counsel here.

Petitioners filed a petition for rehearing en banc, which was denied on January 13, 2005. (App. 11a).

REASONS FOR GRANTING THE PETITION

This Court has not yet spoken on the standard that lower courts should use when determining indigent plaintiffs' requests for appointment of counsel under 28 U.S.C. § 1915 (e). Further, the circuit courts are split on what standard should be used. While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion in deciding whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." Yet even the circuits using the factor approach are not uniform on what factors to consider; and the circuits that utilize an "exceptional circumstances" test have

not developed a uniform definition of what constitutes "exceptional circumstances." For all practical purposes, there is no standard for courts to follow.

In this case, for example, the Ninth Circuit held that the district court abused its discretion in denying counsel, even though it found Respondent educated, literate, articulate and able to understand statutes and legal pleadings, and even though Respondent has prosecuted no less than eighteen lawsuits on his own. The Ninth Circuit chastised the district court for denying counsel when Respondent was able to well articulate his claims, and did not show a likelihood of success on the merits, on the ground that Respondent "lacked legal training" and did not bring a different lawsuit against Petitioners that the court thought could be a "coherent theory for subjecting CCA to liability"—even though, in truth, that different lawsuit would not likely have succeeded. If this is truly the standard for appointing counsel, then with all due respect, trial courts no longer have any discretion to deny requests for counsel. They can no longer objectively examine the cases brought before them. Instead, they must advocate for plaintiffs, and appoint counsel if the courts can manufacture ideas for new claims or theories plaintiffs might try in order to subject defendants to liability, even though these plaintiffs have well articulated the claims they wanted to bring.

The federal statute that governs appointment of counsel for indigent plaintiffs throughout the nation should be given a consistent interpretation throughout the nation. At the moment, there is no consistent interpretation, and as a result, the denial of counsel was ruled an abuse of discretion in this case whereas it likely would not have been had the case arisen in a different circuit using a factor test. Furthermore, because this opinion directs trial courts to appoint counsel even though the plaintiff is literate and articulate, but lacks legal training, regardless of the merits of the claims he raised, the opinion

will likely cause an increase in the amount and cost of litigation, and drain the lower courts' resources that should be preserved for the truly deserving indigent *pro per* litigants who cannot articulate their complex claims. "Every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause." *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir.1989). Certiorari should be accepted to set forth a uniform standard and to correct this dangerous precedent.

I. FEDERAL CIRCUITS ARE SPLIT ON THE DEGREE OF DISCRETION THAT DISTRICT COURTS MAY USE IN DETERMINING REQUESTS FOR APPOINTED COUNSEL.

The circuits are split as to the degree of discretion that district courts may use in ruling on requests for appointment of counsel. While all the circuits recognize that the district courts' determination is discretionary, some circuits, such as the Second, Third, and Seventh, have adopted a broad approach, outlining certain factors for the district courts to consider, and giving them broad discretion in deciding whether to grant such requests. Other circuits, notably the Fourth, Sixth and Ninth, hold that counsel may be appointed only in "exceptional circumstances." *Compare Maclin v. Freake*, 650 F.2d 885, 887-88 (7th Cir.1981) (providing a list of factors for consideration and allowing district courts broad discretion in deciding to grant a request for appointment of counsel) and *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir.1986) (recognizing some circuits have adopted a more "stringent" approach, but opting to follow the lead of the Seventh Circuit) *with Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (in civil actions the appointment of counsel should be allowed only in exceptional cases), *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993) (district courts in the Sixth Circuit may appoint counsel to represent indigent civil litigants only when "exceptional circumstances" are present),

and *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980) ("[T]his court has limited the exercise of [discretionary power under § 1915] to exceptional circumstances"). The Third Circuit, in fact, has expressly rejected the "exceptional circumstances" test that the Fourth, Sixth and Ninth Circuits use. *Tabron v. Grace*, 6 F.3d 147, 155, 158 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994) (holding that use of improper "extraordinary circumstances" standard and failure to provide other reasons for denying appointment of counsel warranted vacation of summary judgment and remand). On the other hand, the First and Fifth Circuits use the words "exceptional circumstances," but then engage in the factor analysis of the Seventh Circuit. *See DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991); *Cox v. Mitchell*, 2004 WL 2545034 (N.D.Tex. 2004).

Those circuits that give trial courts broad discretion based on a number of factors are not even uniform on what factors the trial courts should consider. In fact, some of the circuits' factors are completely different For example, the Second Circuit considers (1) whether the indigent's claims seem likely to be of substance; (2) whether the indigent is able to investigate the crucial facts concerning her claim; (3) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder; (4) whether the legal issues involved are complex; and (5) whether there are any special reasons why appointment of counsel would be more likely to lead to a just determination. *Hendricks v. Coughlin*, 114 F.3d 390, 392 (2d Cir.1997). The D.C. Circuit considers whether plaintiff can afford an attorney, the merits of the plaintiff's case, plaintiff's efforts to secure counsel and plaintiff's capacity to present the case adequately without need of counsel. *Poindexter v. F.B.I.*, 737 F.2d 1173, 1185 (D.C. Cir. 1984). The Tenth Circuit considers the merits of the plaintiff's claims, the nature of the factual issues raised in the claims, the plaintiff's ability to present his claims, and the complexity of the legal issues

raised by the claims. *Long v. Shillinger*, 927 F.2d 525, 527 (10th Cir.1991). The Third Circuit considers (1) the plaintiff's ability to present his case, including his education, literacy, prior work experience, prior litigation experience, and ability to understand English; (2) the difficulty of the legal issues involved in the case; (3) the ability of the plaintiff to investigate his case, including limits related to his incarceration, the extent of discovery, and the effect of complex discovery rules; (4) whether the outcome of the case depends upon witness credibility or expert testimony; (5) the time at which counsel becomes necessary, such as at trial; and (6) the availability of volunteer legal services, weighing the amount of this resource against the needs of the individual case. *Tabron v. Grace*, 6 F.3d 147, 155-157 (3d Cir.1993), *cert. denied*, 510 U.S. 1196 (1994). Had this case arisen in one of these circuits, the appellate court would have been hard pressed to find the denial of counsel an abuse of discretion, as the Ninth Circuit did.

Among the circuits using the extraordinary circumstances test as well, courts have not developed a uniform standard of what constitutes extraordinary circumstances. Most courts have treated this as a factual determination that will vary from case to case. Because the "extraordinary circumstances" test is amorphous and truly standardless, most courts simply conclude that extraordinary circumstances do not exist without providing guidance on their analysis. The Ninth Circuit thus had no real check on its ability to manufacture reasons to reverse this jury verdict.

This non-standard is unacceptable. Given the "significant practical restraints" on the trial courts' discretion—including "the ever-growing number of prisoner civil rights actions filed each year in the federal courts; the lack of funding to pay appointed counsel; and the limited supply of competent lawyers who are willing to undertake such representation without compensation," *Tabron v. Grace*, 6 F.3d 147, 157 (3d

Cir.1993), the lower courts need guidance and a firm understanding of a uniform standard so as to know when appointed counsel is required and when it is acceptable to deny counsel.

II. THE NINTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH ANY OF THE CIRCUITS' STANDARDS FOR APPOINTING COUNSEL

While the standard for appointing counsel is not uniform among the circuits, nevertheless, a trial court's denial of counsel cannot be an abuse of discretion unless the denial resulted in fundamental unfairness impinging on the plaintiff's due process rights. *Maclin v Freake*, 650 F.2d 885, 886 (7th Cir. 1981). Stated another way, a circuit court will override a district court's decision to deny appointed counsel "only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer." *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir.), *cert. denied*, 114 S.Ct. 438 (1993).

Respondent in this case was in no way deprived of any of his due process rights—no matter which circuit's formulation of the federal standard is used. When he sought counsel, he did not even complain that the issues were too complex, or that he was unable to articulate his claims. He complained only about the lack of law library facilities, an issue that became moot shortly thereafter. After that, he well articulated his claims and got them to trial. He filed dozens of pleadings that cited appropriate legal authority. He survived summary judgment motions, and examined and cross-examined witnesses at trial. Respondent demonstrated that he is educated, literate, and very well versed in the civil justice system—having filed eighteen other lawsuits and claiming to have a master's degree from the London School of Economics. And the issues he raised were just not dif-

ficult. There were no complex medical records or injuries, no expert witnesses, no complicated legal analyses involved, no knotty statutory issues. There were two straight-forward issues—excessive force and retaliation—on which the jury was asked to believe either Respondent's story or Petitioners' story. It was simply not "plain beyond doubt before the trial began" that the issues were so difficult relative to Respondent's capabilities that it was "impossible for him to obtain any sort of justice" without a lawyer.

On this record, for the Ninth Circuit to reverse the jury's verdict on the ground that the trial court abused its discretion in failing to appoint counsel frankly obliterates any kind of discretion that the trial court should have had to determine whether Respondent demonstrated the requisite exceptional circumstances. This is especially true given the state of the record at the only time Respondent made a request for counsel to the Arizona District Court—two and a half years before trial—when Respondent complained only about the lack of a law library at the County Jail, which issue became moot when he was transferred shortly thereafter. Denial of counsel under these circumstances could not have been an abuse of discretion—under any of the circuits' formulations of that standard—as the Ninth Circuit held.

A. Educated, literate plaintiffs who can articulate their claims are not entitled to appointed counsel under any circuit's formulation of the federal standard.

Petitioners could not find any other court in the country that has ruled the denial of counsel an abuse of discretion where the plaintiff is literate, educated, and able to articulate the straightforward claims he brought. Instead, trial courts are held to abuse their discretion in denying counsel when the indigent plaintiff demonstrates some kind of physical or mental impairment, or a limited knowledge of the English language, such that the plaintiff cannot adequately present his

case. *See, e.g., Castillo v Cook County Mail Room Dep't*, 990 F.2d 304 (7th Cir. 1993) (trial court erred in failing to *sua sponte* appoint counsel for indigent inmate, where inmate presented colorable claim that prison officials wrongfully opened his legal mail outside his presence, and inmate obviously had limited skills with English language); *McCarthy v Weinberg*, 753 F.2d 836 (10th Cir. 1985) (abuse of discretion to deny counsel where prisoner asserted colorable claim, but was unable to present it due to multiple sclerosis requiring him to appear in court in wheelchair, eyesight was failing, hearing was unpredictable, ability to communicate was impaired, he was unable to read medical records offered into evidence by defendant, and did not understand trial proceeding and nature and application of rules of evidence; denial of appointment of counsel resulted in trial that was fundamentally unfair); *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984) (trial court abused discretion in denying appointed counsel where plaintiff barely able to read and write, and had no experience with the law or legal procedures), *abrogated on other grounds, Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296 (1989). *Cf. Hetzel v Swartz*, 917 F Supp 344 (M.D. Pa. 1996) (appointing counsel for former inmate alleging improper counseling and treatment for AIDS while incarcerated; plaintiff had poor health and marginal literacy, and issues of proper treatment for terminal disease were complex).

Where a plaintiff is literate, educated, articulate, and well versed in legal proceedings, every other circuit in the nation would likely have found the denial of counsel to be well within the trial court's discretion. *See, e.g., Cookish v Cunningham*, 787 F.2d 1 (1st Cir. 1986) (no appointed counsel where facts straightforward, no difficult or complex factual issues or investigative difficulties, inmate did not exhibit functional difficulty that would have prevented him from adequately preparing and presenting case); *Richardson v Henry*, 902 F.2d 414 (5th Cir. 1990) (upholding denial of

counsel where evidence showed that issues were not complex and prisoner could competently represent himself); *Childs v Duckworth*, 705 F.2d 915 (7th Cir. 1983) (denial of counsel upheld; state prisoner alleging denial of right to practice religious beliefs was articulate, important issues were within the prisoner's knowledge, and most facts were undisputed); *Mosby v Mabry*, 697 F.2d 213 (8th Cir. 1982) (state prisoner, who had filed 40 lawsuits alleging numerous civil rights violations by various prison personnel, had demonstrated familiarity with judicial procedure and the substance of his claims); *Lockert v Faulkner*, 574 F. Supp. 606 (N.D. Ind. 1983) (nothing in record indicated existence of physical or mental impairment that would effectively hamper or preclude prosecution of claim, plaintiff's pleadings were good quality and showed care in framing and arguing legal questions); *Davidson v. Goord*, 259 F. Supp. 2d 238 (W.D.N.Y. 2003) (Pro se inmate who was experienced with § 1983 litigation, articulate, and cognizant of basic procedural requirements was not entitled to appointed counsel in suit alleging violations of his right of access to courts and counsel, where suit did not present difficult factual or legal issues); *Hill v. Davidson*, 844 F. Supp. 237 (E.D.Pa. 1994) (inmate not entitled to appointed counsel where he appeared to be literate and educated, legal issues were not very complex, inmate could use law library upon written request, and legal issues were not complex).

Because the Ninth Circuit could not find Respondent unable to articulate the claims he raised, to justify its decision, it manufactured a wholly different lawsuit and cited Respondent's "lack of legal training" as the reason Respondent himself did not raise it, articulate it, or show its supposed merit. This was inappropriate. Courts are supposed to preserve their legitimate advisory role, and refrain from transforming themselves into the "role of an advocate seeking out the strongest arguments and most successful strategies for a party.'" *Strickler v. Waters*, 989 F.2d 1375, 1389 (4th

Cir.1993) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir.1985)). The Ninth Circuit violated this precept by manufacturing a wholly different claim for plaintiff instead of determining Respondent's ability to articulate the claims he did bring. Moreover, the court erred in making the "lack of legal training" the test for requiring appointed counsel. If that were the test, then trial courts would never have the discretion to deny appointed counsel in any *pro per* civil rights case. Finally, the Ninth Circuit erred in failing to acknowledge that the trial court's discretion was fully supported by Respondent's ability to articulate the claims he brought. Instead, it created its own lawsuit, not surprisingly found it unarticulated, and then chastised the district court for denying counsel based on the record before it rather than on a phantom claim that never existed in the case.

B. Excessive force cases like this one are simply not complex.

The vast majority of excessive force cases like the one presented here are found to be straightforward and thus not deserving of appointed counsel.[5] *See, e.g., King v. Patterson*,

---

[5] They are usually not even deserving of a published opinion. *See, e.g., Smith v. Myers*, 2005 WL 525159 (4th Cir. 2005); *Johnson v. Weaver*, 81 Fed. Appx. 841, 2003 WL 22867614 (5th Cir. 2003); *Butler v. Cloud*, 78 Fed. Appx. 374, 2003 WL 22391198 (5th Cir. 2003); *Peoples v. Kimmey*, 67 Fed. Appx. 506, 2003 WL 21143107 (10th Cir. 2003) (excessive force claims are straightforward and the law governing them is settled); *Keller v. Trefz*, 66 Fed.Appx. 44, 2003 WL 1870718 (7th Cir. 2003) (excessive force case factually simple and legally straightforward, presenting no unusual complexity); *Brown v. Kordis*, 46 Fed. Appx. 315, 2002 WL 31055978 (6th Cir. 2002) (excessive force claim had slim chance of success); *Royal v. Doe*, 19 Fed. Appx. 455, 2001 WL 1104467 (8th Cir. 2001) (excessive force claim neither factually nor legally complex); *Stewart v. Simpson*, 15 Fed. Appx. 460, 2001 WL 823873 (9th Cir. 2001) (no exceptional circumstances exist for appointment of counsel for state prisoner in excessive force case); *Rogers v. Scheffer*, 2005 WL 568034 (W.D.Wis. 2005) (excessive force case; law well-established, complaint competently drafted, and plaintiff "is a seasoned litigant," having filed

999 F.2d 351 (8th Cir. 1993) (upholding denial of appointed counsel, noting that case was neither factually nor legally complex, complaint alleged a single incident of excessive force, and plaintiff had clearly communicated his concerns and could adequately present the facts of his case); *Liggins v. Rivas*, 990 F.2d 1258 (9th Cir. 1993) (upholding denial of appointed counsel in excessive force case; plaintiff was working on advanced education; court states that even assuming plaintiff is not well versed in the law and has made serious allegations, case is not exceptional); *Velasquez v. O'Keefe*, 899 F. Supp. 972 (N.D.N.Y.1995) (inmate who brought excessive force action against prison guards not entitled to appointed counsel; dispute over whether prison guards assaulted inmate was not overly complex, and record indicated that inmate had ability to learn and implement legal arguments); *Hall v. City of Philadelphia*, 828 F. Supp. 365 (E.D.Pa. 1993) (plaintiff's ability to handle excessive force claim, together with lack of complexity, negate the need for appointment of counsel).[6]

In light of the foregoing, it is not surprising that the Ninth Circuit could not come up with a real "complexity" to the excessive force claim. In truth, like the cases cited here, the excessive force claim that Respondent brought was simply a

---

seven different lawsuits, is experienced in discovery matters, in defending against motions for summary judgment, and familiar with preliminary pretrial conferences and court procedure); *Shaffer v. Brinegar*, 23 Fed. Appx. 580 (7th Cir. 2001) (issues not complex; plaintiff already demonstrated that he understood elements of excessive force claim and was capable of representing himself at trial).

[6] The Ninth Circuit ignored Respondent's retaliation claim in its opinion. The court neither described any complexities associated with it, nor indicated that Respondent was unable to articulate his contentions, nor came forward with any other justification for requiring appointed counsel on this claim. Petitioners have not found a case in the country requiring appointed counsel where plaintiff alleges that he was placed in segregation due to retaliation rather than due to his own defiant behavior.

matter of whom to believe. There were no experts, no complicated medical issues, and no complex medical records. For this reason, the only complexities the court could cite were three manufactured issues that made no substantive difference to the case that was filed.

As is noted above, not one of the three asserted "complexities" existed. Focusing only on the excessive force claim, the court's first offered complexity was that Respondent could have added the United States as a defendant under the Federal Tort Claims Act, and also sued CCA either directly in tort, or as an added defendant to the FTCA claim. (App. 4a-5a). But the United States would not have been a proper defendant on plaintiff's excessive force claim. The federal government had nothing to do with the amount of force CCA's employees used for plaintiff's take-down. And adding CCA as a defendant to this claim would have made no substantive difference whatsoever. The same evidence was proffered and the same jury instructions were given as would have been had CCA been a defendant. The jury simply found no excessive force. Plainly, the addition of the United States or CCA as defendants to this claim was not a "complexity" that required appointment of counsel.

The Ninth Circuit's second "complexity" was that the case against the individual employees should have been brought under *Bivens*, and not under § 1983 as Respondent had cited (App. 5a). But it is completely irrelevant that *Bivens* was the correct jurisdictional basis rather than 42 U.S.C. § 1983. *Bivens* actions and § 1983 actions are analogous; the only difference is that *Bivens* applies to constitutional violations by federal, rather than state officials. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996) (Section 1983 and Bivens actions identical except for requirement of state actor under § 1983 and federal actor under *Bivens*). For this very reason, no one raised this technicality below; no one moved to dismiss on this basis; the case went to trial despite plaintiff's reliance on § 1983 instead of *Bivens*; and the jury instructions that were

given were no different than those that would have been given had plaintiff stated the correct jurisdictional basis. Even on appeal, Petitioners simply noted in passing that the correct legal basis for the suit was *Bivens* instead of § 1983. This was certainly not a "complexity" of the case that required appointment of counsel.

The court's third cited complexity was that "an issue existed as to whether the prison's policies requiring restraints when transporting inmates applied to a non-criminal detainee like plaintiff (App. 5a), but plaintiff, who lacks legal training, did not "properly frame" this issue or ask for those policies (App. 5a, 6a). Of course, the propriety of requiring restraints to transport Respondent was not a claim in this case in any way, shape or form. Furthermore, if the court was suggesting that **this** case was complex because it thought Respondent could sue the federal government and CCA on a **different** claim—i.e., for requiring transport restraints for detainees—the court respectfully was wrong. No prison in the nation allows detainees to be transported outside the facility without restraints; and no prison in the nation allows a detainee to direct when a reduced level of restraint will be used. A written doctor's order is required before any inmate can be transported with a reduced level of restraint. Not surprisingly, the Ninth Circuit did not cite any authority showing that Respondent would likely have succeeded on such a claim. In truth, such a challenge to the prison's policy to restrain detainees for transport would have flown in the face of *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (conditions of pretrial detention reasonably related to a legitimate governmental objective are constitutional) and *Turner v. Safley*, 482 U.S. 78, 89 (1987) (jail officials, more experienced in the behavior of inmates, must have the latitude "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). Thus, the court's third cited "complexity" was not a viable justification for requiring appointed counsel.

The panel cited one last "fact" that it said "enhanc[ed] the exceptional character of the case," and that was "the anomaly of incarcerating a person on non-criminal charges and confining him for seven years." (App. 6a). But the length of plaintiff's detainment was never an issue, a claim, or an argument in this lawsuit. In fact, the Ninth Circuit had already ruled in a prior opinion that the length of Respondent's incarceration was constitutional. *Agyeman v. Coachman*, 74 Fed. Appx. 691, 694 (9th Cir. 2003). In that same decision, the court found that it was Respondent himself who had substantially caused the delays with which the court seemed to be so concerned in this case. The length of Respondent's detainment was not an exceptional circumstance that required appointed counsel here.

In summary, while all the circuits acknowledge that a district court's decision on appointment of counsel is "discretionary," the circuits are split on what the federal standard for appointing counsel really is. Is it a broad discretionary approach based on factors that vary circuit to circuit? Or is the district court's discretion limited to appointing counsel only in "exceptional circumstances," which itself has not been conclusively defined? Whichever formulation the Court selects, in no event should an appellate court be able to manufacture a non-existent claim on behalf of an indigent plaintiff, and then reverse the district court for having denied counsel on the claims and record before it, when that record supported the denial of counsel under any circuit's formulation of the standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Ste. 800
Phoenix, Arizona 85012
(602) 263-1700

* Counsel of Record

Counsel for Petitioner

April 13, 2005